

1-1-1996

Aggressive Panhandling Legislation and the Constitution: Evisceration of Fundamental Rights--Or Valid Restrictions Upon Offensive Conduct

Darryl C. Delmonico

Follow this and additional works at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly



Part of the [Constitutional Law Commons](#)

Recommended Citation

Darryl C. Delmonico, *Aggressive Panhandling Legislation and the Constitution: Evisceration of Fundamental Rights--Or Valid Restrictions Upon Offensive Conduct*, 23 HASTINGS CONST. L.Q. 557 (1996).

Available at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol23/iss2/4

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

NOTES

Aggressive Panhandling Legislation and the Constitution: Evisceration of Fundamental Rights—Or Valid Restrictions Upon Offensive Conduct?

By DARRYL C. DELMONICO*

Table of Contents

Introduction	558
I. Panhandling and the First Amendment	560
A. Blanket Bans on All Forms of Panhandling	562
1. Pure Speech	563
2. Expressive Conduct.....	564
3. Charitable Solicitation	566
4. Commercial Speech.....	568
B. Blanket Bans: A Conclusion	570
II. Aggressive Panhandling and the First Amendment	571
A. The <i>O'Brien</i> Standard	572
1. California Penal Code § 647(c)	573
B. Reasonable Time, Place, and Manner Restrictions..	574
1. Seattle Municipal Code § 12A.12.015	574
III. Aggressive Panhandling and Due Process.....	576
A. The Void for Vagueness Doctrine.....	576
1. California Penal Code § 647(c)	578
2. Seattle Municipal Code § 12A.12.015	580

* J.D. Candidate, 1996; B.S., Pennsylvania State University, 1992. By day, Darryl is serving his second tour of duty with the international business advisory and financial services firm of Price Waterhouse, LLP, as a certified public accountant and tax consultant. By night, Darryl is an aspiring poet and overall philosophical pundit—without much of a following, but nonetheless dedicated to the pursuit of those endeavors. Believing that *perfection* is boring—Darryl prefers to learn from his own mistakes rather than from the mistakes of others. Surprisingly, this still leaves him with plenty of time to enjoy the finer things in life such as wine and the culinary arts.

IV. Aggressive Panhandling and Equal Protection	582
A. Indigents Are Not a Suspect Class	583
B. Discriminatory Treatment in the Exercise of a Fundamental Right	584
1. Panhandling as Protected Commercial Speech	584
2. The Content Neutrality Requirement	585
a. California Penal Code § 647(c)	587
b. Seattle Municipal Code § 12A.12.015	589
C. Aggressive Panhandling and Equal Protection: A Conclusion	589
Conclusion	590

Introduction

With public opinion weighing heavily against panhandlers in general and aggressive panhandling¹ in particular, elected officials face the difficult task of enacting legislation which both satisfies their constituencies and survives constitutional challenges. A sample of recent public opinion indicates the public's patience with panhandlers is steadily dwindling.² Surprisingly, many peaceful panhandlers are themselves in favor of proscriptions which outlaw threatening, intimidating, or abusive behavior accompanying panhandling.³ Additionally, it has been reported that somewhere between sixty-five and

1. UNITED STATES CONF. OF MAYORS, A STATUS RPT. ON HUNGER & HOMELESSNESS IN AMERICA'S CITIES: 1990 50-53 (1990) (discussing a clear trend of public intolerance and sometimes hostility towards panhandlers, individuals perceived to be homeless, and aggressive panhandling in particular which is accompanied by abusive or threatening behavior).

2. Robert L. Gaskin, *Taking Back the Streets; San Francisco, California's Ordinance to Control the Homeless*, NAT'L REV., Sept. 12, 1994, at 22 (reporting that the "Matrix" program instituted by Mayor Frank Jordan was a direct result of the general public outcry regarding the homeless and panhandlers in particular); Alexander Peters, *Begging's the Question in S.F. Suit; Ex-Panhandler Challenging State Law's Constitutionality*, THE RECORDER, Apr. 25, 1991, at 1, 6 (citing a survey that found that 46% of nonresidents and 39% of residents had feared for their personal safety following confrontations with the large number of panhandlers in San Francisco).

3. Matt Neufeld, *Street Beggars Get Warning: Be Polite; Fliers Clarify 'Aggressive' Panhandling*, WASH. TIMES, June 16, 1993, at B1. (Quoting a Georgetown panhandler in response to the new ordinance banning "aggressive" panhandling, "If they're aggressive, I think they should be locked up."); Morenike Efuntade, *Panhandlers Warned in Leaflets; New D.C. Law Bars Aggressive Behavior, Blocking Doorways*, WASH. POST, June 16, 1993, at C3 (quoting the belief of an anonymous Georgetown panhandler that some panhandlers scare tourists and make it more difficult for the passive panhandlers to survive, "[t]his is a good law."); Bob Whitby, *Tampa Cracks Down on Panhandlers*, ST. PETERSBURG TIMES, Aug. 6, 1993, at 1 (paraphrasing the opinion of Jessie Hawthorne, a self-described panhandler, that some street beggars ply their trade with the "purpose of hurting people and taking something").

eighty-five percent of typical urban homeless are alcoholic, mentally impaired, addicted to drugs, or some combination of the three.⁴

Although the Supreme Court has never addressed the constitutionality of passive panhandling⁵ prohibitions, many jurisdictions with such ordinances choose to forego enforcement since the prevailing conclusion is that blanket bans on panhandling infringe upon an individual's right to free speech.⁶ Several influential jurisdictions have struck down anti-panhandling prohibitions as violative of an individual's First Amendment right to free speech.⁷ Thereafter, local legislators responded by drafting regulations which focus not on begging per se, but on *conduct* accompanying aggressive panhandling—conduct not considered inherent to the communication of the panhandler's message. The proscriptions, known as anti-aggressive panhandling statutes, have become extremely popular recently. Since 1977, governmental entities in ten states and the District of Columbia have enacted aggressive panhandling statutes.⁸ The primary question raised

4. Elena Neuman, *Attitudes Hardening Toward the Homeless; As Public Gets More Fed Up, Cities Respond with Tough Laws*, WASH. TIMES, Mar. 2, 1994, at A7. See also Neal R. Pierce, *Philly's Kinder, Gentler Center City*, NAT'L J., Apr. 25, 1992, at 1015 (citing similar statistics within Philadelphia).

5. Passive panhandling is commonly thought to include such solicitations as displaying a sign asking for financial assistance or the mere extension of one's hand (or cup) accompanied by a request for alms. *Ulmer v. Municipal Ct.*, 127 Cal. Rptr. 445, 447 (Alameda County 1976); see also *Loper v. N.Y. City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993).

6. Although 26 states currently have anti-panhandling laws, only two—Maryland and Arizona—have recently made arrests for violations of their panhandling prohibitions. Robert Teir, *Maintaining Safety and Civility in Public Places: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285, 302, 303 n.101 (1993).

7. *Blair v. Shanahan*, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991) (The holding that panhandling was protected speech was vacated by the original presiding judge on procedural grounds in February, 1996. The vacating has no effect on existing law in the State of California since the *Blair* court was merely applying judicial precedent. *Rex Bossert, Anti-Panhandling Law Can Be Enforced*, S.F. DAILY J., Feb. 2, 1996, at 1); *Loper*, 999 F.2d at 704; *C.C.B. v. State*, 458 So. 2d 47, 48 (Fla. Dist. Ct. App. 1984).

8. CAL. PENAL CODE § 647(c) (West 1995) (prohibiting "accost[ing] other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms"); S.F., CAL., MUN. CODE §§ 120-21 (1992) (prohibiting "harassment and hounding" in the course of soliciting alms); HAW. REV. STAT. § 711-1101(1) (1985) (prohibiting "physical inconvenience or alarm" through physical obstruction of others while panhandling or soliciting alms in public); SEATTLE, WASH., MUN. CODE § 12A.12.015 (1987) (forbidding "aggressive panhandling"); MINNEAPOLIS, MINN., CHARTER & CODE OF ORDINANCES tit. 15, § 385.65 (1988) (forbidding the interference of either pedestrian or vehicular traffic); ALBUQUERQUE, N.M., MUN. CODE § 12-1-2-7 (1988) (prohibiting "aggressive[] begging"); ATLANTA, GA., CODE OF ORDINANCES § 17-3006 (1991) (prohibiting the solicitation of alms or panhandling by "accosting another"); BALTIMORE, MD., CITY CODE, art. 19, § 249 (1994) (criminalizing aggressive panhandling); CINCINNATI, OHIO, MUN. CODE § 910-913 (1992) (forbidding interference with pedestrian or vehicular traffic); DALLAS, TEX., CITY CODE § 31-35 (1991) (outlawing "solicitation by coercion" after a negative response has

by aggressive panhandling is: to what extent can panhandling and its accompanying conduct be constitutionally prohibited?

The recent spate of legislation designed to combat the intimidating and offensive conduct associated with aggressive panhandling will have to survive three primary constitutional arguments in order to avoid invalidation: (1) the assertion that panhandling is protected speech under the First Amendment, (2) that "aggressive" panhandling prohibitions are too vague to be understood by a person of average intelligence and therefore violate due process, and (3) the notion that "aggressive" panhandling prohibitions are content-based restrictions which violate equal protection.

Part I of this Note discusses settled legal principles which hold that blanket bans on passive panhandling are per se violative of the First Amendment since they cannot be considered 'narrowly tailored' in furtherance of their governmental objectives. Within this introductory framework, the remainder of this Note will evaluate the constitutionality of legislation which purports to prohibit the aggressive behavior often accompanying the solicitation of alms. In order to illustrate the pitfalls that await the drafters of such legislation, two current aggressive panhandling provisions will be tested under the three relevant constitutional safeguards which exist to protect U.S. citizens from laws which infringe upon the fundamental rights of the individual. Part II evaluates the constitutionality of aggressive panhandling proscriptions under the *O'Brien* standard and against a legislative backdrop which permits reasonable time, place, and manner restrictions on communications protected by the First Amendment. Part III measures the chosen aggressive panhandling legislation against the Due Process Clause of the Fourteenth Amendment while Part IV applies a similar analysis under the Equal Protection Clause of the Fourteenth Amendment. The Note concludes that legislators may properly enact prohibitions which outlaw aggressive panhandling within the parameters of the Constitution. This conclusion is unavoidable despite the existence of constitutional safeguards designed to protect fundamental individual liberties.

I. Panhandling and the First Amendment

The First Amendment guarantee of free speech has been held applicable to the states via the Due Process Clause of the Fourteenth Amendment.⁹ State and lower federal courts have reached different conclusions in applying First Amendment jurisprudence to anti-pan-

been given); *TULSA, OKLA., PENAL CODE* § 1407 (1992) (forbidding stopping others for the purpose of asking for money); and 22 D.C. CODE ANN. § 3311 (1993) (proscribing "aggressive panhandling").

9. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

handling laws.¹⁰ Restrictions focusing solely on the panhandler's speech go directly to the heart of the First Amendment. However, the legislature can outlaw *conduct* which falls outside of communications recognized by the First Amendment. If the mere act of panhandling falls within the constitutionally protected definition of "speech," then blanket bans on panhandling violate the First Amendment.

While not the focus of this Note nor the subject of most aggressive panhandling prohibitions, it is worth noting that legislators can outlaw panhandling that 'intimidates' or 'accosts' solely by way of obscene or threatening language. Although obscene words and verbal threats are a form of 'speech' in its purest form—communication falling within this category has never been protected under the First Amendment.¹¹ As such, this Note will focus on legislation prohibiting the nonspeech aspects of aggressive panhandling.

The analysis begins with the concept of protected speech under the free speech guarantee of the First Amendment. Maximum protection is accorded to communication which is characterized as "pure speech,"¹² "expressive conduct,"¹³ or "charitable solicitation,"¹⁴ while a somewhat lesser degree of constitutional protection is afforded to "commercial speech."¹⁵ Additionally, when the intent of legislation is to regulate only the nonspeech portion of expressive conduct, incidental limitations on First Amendment rights may be justified.¹⁶

A finding that panhandling warrants full protection under the First Amendment will require that any regulation of the panhandler's speech in the traditionally public forums of streets and sidewalks¹⁷ be narrowly tailored¹⁸ to achieve a compelling state interest.¹⁹ In con-

10. *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991); *Loper v. N.Y. City Police Dep't*, 999 F.2d 699 (2d Cir. 1993); *C.C.B. v. State*, 458 So. 2d 47 (Fla. Dist. Ct. App. 1984) (cases invalidating panhandling prohibitions as violative of the First Amendment); *but cf.* *Young v. N.Y. City Transit Auth.*, 903 F.2d 146, 154 (2d Cir. 1990); *City of Seattle v. Webster*, 115 Wash. 2d 635; *Ulmer v. Municipal Ct.*, 127 Cal. Rptr. 445, 448 (Alameda County 1976) (cases upholding panhandling proscriptions despite First Amendment challenges).

11. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("[F]ighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the First Amendment because their "slight social value as a step to truth . . . is clearly outweighed by the social interest in order and morality."). *Id.* at 572.

12. *Carey v. Brown*, 447 U.S. 455, 460 (1980).

13. *Spence v. Washington*, 418 U.S. 405, 409-10 (1974).

14. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 676 (1992); *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 797 (1985).

15. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 429 (1992) (Stevens, J., concurring).

16. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

17. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (observing that streets and sidewalks are traditionally public fora).

18. The requirement that regulations be "narrowly tailored" serves as a limit upon the methods chosen by the legislature to further the compelling interest: the restriction on

trast to the compelling interest level of scrutiny, a conclusion that panhandling is commercial speech will result in a lower level of protection from legislative regulation.²⁰

Even assuming that panhandling constitutes protected speech, some regulation of the accompanying conduct may still be allowed. The *O'Brien* standard²¹ permits restrictions on the nonspeech portion of a panhandler's conduct where only slight limitations on the ability to exercise First Amendment rights occur.²² A state may also enforce reasonable time, place, or manner restrictions on speech or expressive conduct as long as the regulation is *content-neutral*, *narrowly tailored* to serve a *significant* government interest, and leaves open adequate *alternative channels* of communication.²³

A. Blanket Bans on All Forms of Panhandling

Examining panhandling within the framework of the First Amendment requires an evaluation of legislative bans on all forms of panhandling, which would include the passive solicitation of alms. The distinction between aggressive and passive panhandling is based on the behavior accompanying the request for financial assistance. Passive panhandling can generally be defined to encompass behavior such as: asking for "spare change," sitting beside a sign that asks for financial help, or the mere extension of an open hand.²⁴ Aggressive panhandling can broadly be defined to include a request or demand for money which is accompanied by threatening, intimidating, or menacing behavior.²⁵ Blanket bans which encompass passive panhandling are of questionable constitutional validity since passive panhandling—without any aggressive conduct—constitutes speech protected under

speech interests must not be substantially more intrusive than any other regulatory alternatives that would equally accomplish the governmental objective. *Ward v. Rock Against Racism*, 491 U.S. 781, 796-802 (1989).

19. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 676 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 461 (1980). Protecting the public from "undue annoyance" has been recognized as a "substantial" government interest. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980).

20. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429 (1992) (Stevens, J., concurring).

21. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). See *infra* note 80-83 and accompanying text.

22. *Id.*

23. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry Educ. Ass'n*, 460 U.S. at 45; *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535-36 (1980).

24. See *supra* note 5.

25. See, e.g., *infra* note 177-178 and accompanying text.

the First Amendment.²⁶ As with any other legislation which infringes upon a fundamental right, the First Amendment requires that any regulation on protected speech be narrowly tailored to further a compelling governmental interest.²⁷ Government cannot regulate pure speech when the speech restriction is based upon the speech's *content* absent a compelling state interest.²⁸ This principle finds its origin in the first words of the Bill of Rights.²⁹

1. *Pure Speech*

Communication characterized as "pure speech" is presupposed to embody a message conveying the speaker's opinion on such weighty matters as societal, economic, or political issues.³⁰ It has been suggested that panhandling itself is not pure speech because its objective is the transfer of money, and speech is not an inherent facet of the conduct as one can "beg" without speaking a single word.³¹ Were the Supreme Court to determine that such societal, economic, or political viewpoints were inextricably intertwined³² with the panhandler's request for alms, the panhandler's message would almost assuredly be characterized at the very least as "charitable solicitation," which is a lesser form of pure speech.³³

Judicial interpretations, however, support the conclusion that the mere act of panhandling falls short of characterization as pure speech.³⁴ However, maximum protection under the First Amendment may still be extended under a theory that the panhandler's message is either expressive conduct or a charitable solicitation.

26. *C.C.B. v. State*, 458 So. 2d 47, 48 (Fla. Dist. Ct. App. 1984). *But see* *Ulmer v. Municipal Ct.*, 127 Cal. Rptr. 445, 447 (Alameda County 1976).

27. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 796-802 (1989).

28. *See* *Carey v. Brown*, 447 U.S. 455, 465 (1980).

29. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I, § 1.

30. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

31. *Young v. N.Y. City Transit Auth.*, 903 F.2d 146, 153-54 (2d Cir. 1990) (holding the test for determining whether or not conduct possesses adequate elements of communication to merit analysis under the First Amendment is whether a particularized message was present, and whether there was a great likelihood that those viewing the message would understand it). *See also* *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

32. *Village of Schaumburg*, 444 U.S. at 632 (holding that an ordinance prohibiting door-to-door or on-street solicitation by charitable organizations was unconstitutionally overbroad in violation of the First and Fourteenth Amendments).

33. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985).

34. *Young*, 903 F.2d at 153; *Ulmer v. Municipal Ct.*, 127 Cal. Rptr. 445, 447 (Alameda County 1976).

2. *Expressive Conduct*

The test for determining whether or not particular conduct possesses sufficient elements of communication to warrant characterization as protected speech was set forth in *Spence v. Washington*.³⁵ In *Spence*, the Court stated that conduct is accorded full protection under the free speech guarantees of the First Amendment when there is "[a]n intent to convey a particularized message . . . , and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."³⁶

The key question, then, is whether panhandling involves an intent to convey a particularized message. Whereas the war protester in *Spence* displayed a peace symbol taped to an upside-down United States flag in order to convey his protest of United States actions in Cambodia and the fatal shootings at Kent State University,³⁷ panhandlers engage in conduct designed primarily to solicit money for themselves. As the Second Circuit noted in *Young v. New York Transit Authority*,³⁸ "begging is not inseparably intertwined with a 'particularized message'. . . most individuals who beg are not doing so to convey any social or political message. Rather, they beg to collect money."³⁹ The *Young* court further noted that regardless of whether or not the panhandler has the *intent* to communicate any particularized message, there is no great likelihood that those viewing the conduct would understand the message as anything other than an attempt to solicit alms.⁴⁰

Although the court's reasoning in *Young* is very persuasive, a strong case can be made that panhandling deserves maximum First Amendment protection as expressive conduct. While the *Young* court chose to characterize panhandling as conduct with the primary objective of obtaining money,⁴¹ other commentators have observed that panhandling is a method by which the disenfranchised members of society choose to convey the reality of their plight.⁴² Two commentators argue that "[b]egging does considerably more than 'propose a commercial transaction.' Like other charitable requests, begging appeals to the listener's sense of compassion or social justice, rather than to his economic self-interest."⁴³ Therefore, panhandling can be con-

35. 418 U.S. 405 (1974).

36. *Id.* at 410-11.

37. *Id.* at 405.

38. 903 F.2d 146 (2d Cir. 1990).

39. *Id.* at 153.

40. *Id.* at 153-54.

41. *Id.* at 153.

42. Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 908 (1991).

43. *Id.*

strued as conveying the speaker's ideas about the social and political environment as well as the deficient way in which the government provides for the less fortunate citizens of this country. As the court in *Blair v. Shanahan*⁴⁴ pointed out,

A request for alms clearly conveys information regarding the speaker's plight. Panhandling gives the speaker an opportunity to spread his views and ideas on, among other things, the way our society treats its poor and disenfranchised. And in some cases, a panhandler's request can change the way the listener sees his or her relationship with and obligations to the poor.⁴⁵

In this context, the mere act of panhandling could properly be considered expressive conduct within the judicial definition of that term.

Given the contrasting views of the aforementioned courts in two of the most influential jurisdictions in the country,⁴⁶ whether or not panhandling warrants status as expressive conduct appears to be an open question. Although the Supreme Court could plausibly rule either way in deciding whether or not panhandling embodies sufficient elements of communication to warrant classification as "expressive conduct," it is highly unlikely that the Court would be willing to follow the reasoning of the district court in *Blair*. When faced with the issue of solicitation of alms by charities in public places, the Supreme Court has consistently chosen to consider the issue under a charitable contribution analysis rather than an expressive conduct analysis.⁴⁷ Unless the Court decides to make a distinction between soliciting funds for oneself and soliciting for a charity, it is likely that the Supreme Court would accept the conclusion reached in *Young* that a panhandler's message is *not* expressive conduct within the definition set forth in *Spence v. Washington*.⁴⁸

Unquestionably, the courts are in disagreement as to whether or not panhandling falls within the First Amendment umbrella of "expressive conduct." While the panhandler may very well be attempting to convey the message theorized by the *Blair* Court, perhaps a more reasonable conclusion was reached in *Young*. The average person ap-

44. 775 F. Supp. 1315, 1322-23 (N.D. Cal. 1991) (vacated on procedural grounds).

45. *Id.*

46. The Circuit Court of Appeals for New York in *Young v. N.Y. City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990) (holding that panhandling is not protected speech); *cf.* the opinion of the District Court for the Northern District of California in *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991) (holding that panhandling is protected speech).

47. *See, e.g.,* *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (cases analyzing the issue from a "charitable solicitation" perspective rather than an "expressive conduct" point of view). Note that even as a charitable solicitation, panhandling would receive the full protection of the First Amendment.

48. 418 U.S. 405 (1974).

proached by a panhandler on a street or sidewalk presumably interprets the panhandler's conduct to be a request for money—nothing more and nothing less. A request for money is a message which has never been recognized as a type of communication deserving maximum First Amendment protection.

While analyses under pure speech or expressive conduct theories yield inconclusive results, panhandling may still be accorded status as fully protected speech if it meets the criteria for charitable solicitation.

3. Charitable Solicitation

As first stated in *Village of Schaumburg v. Citizens for a Better Environment*⁴⁹ and recently reaffirmed in *International Society for Krishna Consciousness v. Lee*,⁵⁰ charitable solicitation is entitled to maximum protection under the free speech guarantee of the First Amendment. The rationale underlying this conclusion was discussed by the Court in *Cornelius v. NAACP Legal Defense and Education Fund*,⁵¹ which held that a nexus exists between charitable solicitations and the dissemination of information about societal causes or the advocacy of political ideas.⁵² In order for face-to-face requests for funds to fall within the definition of charitable solicitations, the United States Supreme Court has repeatedly required the solicitation and accompanying speech to be so intertwined as to presume that the speech is *inherent* to the conduct.⁵³ When confronted with the issue of whether an ordinance regulating the solicitation of funds by a charitable organization passed constitutional muster, the *Schaumburg* Court stated that “[s]oliciting financial support is undoubtedly subject to reasonable regulation but . . . must be undertaken with due regard for the reality that [charitable] solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues.”⁵⁴ Additionally, the Court indicated that conduct warrants characterization as a charitable solicitation when it concerns more than just private economic interests; otherwise, such conduct risks classification as “commercial speech.”⁵⁵

Given the existing First Amendment jurisprudence related to “charitable solicitation,” it is likely that even “passive” panhandling would fall outside of the stated criteria. Face-to-face solicitation for personal financial assistance may be readily accomplished without the

49. 444 U.S. 620, 632 (1980).

50. 505 U.S. 672, 676 (1992).

51. 473 U.S. 788, 799 (1985).

52. *Id.* at 799.

53. *Thomas v. Collins*, 323 U.S. 516, 534 (1945).

54. *Village of Schaumburg*, 444 U.S. at 632 (emphasis added).

55. *Id.*

need for any speech at all,⁵⁶ let alone be possessed with the intent to convey a political belief or a message related to societal interests. Additionally, panhandling is conduct which is primarily (if not solely) concerned with the private economic interests of the speaker.

This viewpoint, however, is not conclusive with regard to the possible classification of panhandling as charitable solicitation. As the *Blair* court noted:

[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. No distinction of constitutional dimension exists between soliciting funds for oneself and for charities.⁵⁷

If panhandling is characterized as either pure speech, expressive conduct, or charitable solicitation—all receiving full First Amendment protection—a blanket ban on panhandling cannot survive a First Amendment challenge. Such blanket prohibitions on these types of speech are not narrowly tailored to achieve any compelling state interest and cannot withstand First Amendment challenges.⁵⁸ Although protecting its citizens from undue annoyance has been recognized as a substantial state interest,⁵⁹ it falls short of the requisite *compelling* state interest standard. Furthermore, it cannot reasonably be postulated that the general appearance of panhandlers creates an unreasonable environment of undue annoyance. A passerby can simply avoid the alleged annoyance by walking away or ignoring the panhandler. Any possible annoyance resulting from tolerating the mere existence of panhandlers would certainly fall short of justifying an infringement upon First Amendment liberties.

Perhaps even more dispositive is the extreme unlikelihood that a court would conclude that any blanket ban could ever be narrowly

56. The consensus definition of the term "passive" panhandling given earlier, *see supra* note 5, includes such conduct as extending a cup to a passerby or displaying a sign asking for donations.

57. *Blair v. Shanahan*, 775 F. Supp. 1315, 1322 (N.D. Cal. 1991) (quoting *Village of Schaumburg*, 444 U.S. at 632). *See supra* note 7.

58. It is difficult to conceive of a narrowly tailored blanket prohibition. While a state may have a variety of "compelling interests" which would support some infringement upon an individual's First Amendment right to speech (including such recognized objectives as protecting citizens from undue annoyance, fear, fraud, or intimidation), the Supreme Court would likely conclude that legislation could be drafted in a manner less intrusive upon an individual's fundamental liberties than a "blanket ban." *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

59. *Village of Schaumburg*, 444 U.S. at 636 (stating that recognized "substantial" government interests include "protecting the public from fraud, crime and undue annoyance").

tailored. As the Second Circuit has stated: "Even if the state were considered to have a compelling interest in preventing the evils sometimes associated with panhandling, a statute that totally prohibits panhandling in all public places cannot be considered 'narrowly tailored' to achieve that end."⁶⁰

Despite the lack of consensus with regard to the proper First Amendment classification of panhandling, all jurisdictions have accorded panhandling the status of "commercial speech."

4. Commercial Speech

It has been suggested that panhandlers soliciting alms should be treated no differently than a charitable organization soliciting financial funds as a group. This would necessarily qualify panhandling for maximum protection under the First Amendment,⁶¹ although the more common belief is that panhandling proposes a commercial transaction and is therefore properly characterized as "commercial speech."⁶²

The Commercial Speech Doctrine was formulated by the Supreme Court in *Valentine v. Chrestensen*⁶³ and subsequently refined under the rulings in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,⁶⁴ and *Board of Trustees of the State University of New York v. Fox*.⁶⁵ Although commercial speech receives less protection under the First Amendment than does pure speech, expressive conduct, or charitable solicitation,⁶⁶ the *Cen-*

60. *Loper v. N.Y. City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993).

61. *Id.* at 705.

62. Commercial speech was defined by the Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *see, e.g.*, *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473 (1989) (reaffirming the Court's definition of commercial speech as that which does "no more than propose a commercial transaction"); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (noting that there is a common sense distinction between speech with incidental commercial purposes and speech having its primary objective as proposing a commercial transaction); *see also City of Cincinnati v. Discovery Network Inc.*, 113 S. Ct. 1505, 1513 (1993) (noting that speech is characterizable as commercial speech when conduct "relate[s] solely to the economic interests of the speaker and its audience").

63. 316 U.S. 52, 54 (1942) (holding that "the Constitution imposes no . . . restraint on government as respects purely commercial [speech]," which essentially authorized the government to regulate commercial speech in any manner it deems necessary); *Cf. Village of Schaumburg*, 444 U.S. at 632 n.7 ("[t]o the extent that any of the Court's past decisions . . . hold or indicate that commercial speech is excluded from First Amendment protections, those decisions, to that extent, are no longer good law.") Thus, the Court retreated from its earlier decision that commercial speech was entitled to *no* First Amendment protection whatsoever.

64. 447 U.S. 557 (1980).

65. 492 U.S. 469 (1989).

66. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429 (1992) (Stevens, J., concurring).

tral Hudson Court developed the following four-part analysis for determining the constitutionality of commercial speech regulations:

For commercial speech to come within that [First Amendment protection], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.⁶⁷

Under the fourth prong of this analysis, the Court does not require that the manner of regulation be the least severe to accomplish the desired end.⁶⁸ Rather, there merely must be a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends."⁶⁹ In *City of Cincinnati v. Discovery Network, Inc.*,⁷⁰ the Court recently held that it is unnecessary to show that less intrusive infringements upon individual liberties may be available in order to uphold such a restriction on commercial speech:

While we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have we rejected mere rational basis review. A regulation need not be "absolutely the least severe that will achieve the desired end," but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.⁷¹

Accordingly, two inquiries must be answered in the affirmative before the Court will uphold the constitutionality of a blanket ban on panhandling under a commercial speech analysis. First, it must be determined whether passive panhandling is an undue annoyance.⁷² Given that passive panhandling is included in a blanket ban, the Court is not likely to reach this conclusion since any passerby approached by a passive and peaceful panhandler can walk away from this allegedly "undue" annoyance. Second, the Court would have to find that a blanket ban on panhandling bears a reasonable fit to the achievement of the stated governmental interest. This is doubtful given the following observation made by the *Central Hudson* Court:

We review with special care regulations that *entirely suppress* commercial speech in order to pursue a nonspeech-related pol-

67. *Central Hudson*, 447 U.S. 557 at 566.

68. *Board of Trustees*, 492 U.S. 469 at 480.

69. *Id.* (quoting *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986)).

70. 113 S. Ct. 1505 (1993).

71. *Id.* at 1510 n.3.

72. *Village of Schaumburg*, 444 U.S. at 636 (noting that "undue annoyance" is a substantial governmental interest).

icy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. Indeed in recent years *this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way*, either because it was deceptive or related to unlawful activity.⁷³

Based on the foregoing guidance, blanket bans on panhandling could be held unconstitutional even when reviewed under the lenient Commercial Speech Doctrine. This is true for several reasons. First, there are numerous and less-intrusive alternatives available in order to achieve the state's substantial interest in protecting the public from undue annoyance. For example, the state can enact legislation limited to barring the aggressive, intimidating, or abusive behavior which may accompany a panhandler's solicitation of alms. Certainly this option provides a significantly more reasonable fit between the legislative means and ends of the state. Second, given the Court's stated reluctance to uphold any type of blanket ban on commercial speech, a particularly persuasive justification for a complete suppression of commercial speech would have to exist in order for the Court to alter its current position on blanket bans. The ability of the passerby to ignore, avoid, or walk away from a panhandler would seem to mitigate the undue annoyance factor used by the state to justify its blanket ban.

Finally, panhandling is neither deceptive nor related to unlawful activity⁷⁴—two characteristics necessary for the Court to uphold the constitutionality of a complete suppression of commercial speech. Panhandling is not deceptive since the panhandler is affirmatively making a plea for financial assistance based on the desperateness of his or her situation. The panhandler *intends* for those solicited to understand that a "donation" is being sought for the panhandler's own personal well-being. Additionally, neither charitable solicitation nor charitable donation have been found to be unlawful conduct.

In light of the foregoing, it is highly unlikely that the Supreme Court would uphold the constitutionality of a blanket ban on panhandling even under a commercial speech analysis.

B. Blanket Bans: A Conclusion

The constitutionality of legislation purporting to ban all forms of panhandling is highly suspect. If panhandling is accorded status as either pure speech, expressive conduct, or charitable solicitation, it is entitled to maximum protection under the First Amendment and any

73. *Central Hudson*, 447 U.S. at 566 n.9 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 780 n.8 (1976) (Stewart, J., concurring)) (emphasis added).

74. Note that in this context, "deceptive" speech refers to fraudulent or false advertising which is intended to defraud the public, rather than a panhandler's solicitation of alms based on a false comment. See *Virginia State Bd.*, 425 U.S. at 771-72.

restriction must be narrowly tailored to achieve a compelling state interest.⁷⁵ If the Court declines to confer maximum protection upon panhandling under the First Amendment, the characterization of panhandling as commercial speech is a virtual certainty. Although commercial speech is entitled to a lower level of protection under the First Amendment, a blanket ban on panhandling is the most intrusive manner in which a state could seek to protect the public from any allegedly undue annoyance resulting from panhandling. While this aspect of the blanket ban does not render it unconstitutional per se, the Court has discouraged any kind of blanket ban on commercial speech with some minor exceptions,⁷⁶ none of which apply to the panhandlers' speech. In light of this, a blanket ban on panhandling would be struck down as a violation of the First Amendment.

Despite the inevitable conclusion that blanket bans are always unconstitutional infringements on the First Amendment right to free speech, legislative prohibitions limited to *aggressive* panhandling may elicit a different conclusion. Legislation proscribing aggressive panhandling is designed to prohibit conduct which is unrelated to the communicative aspects of the panhandler's message. Such prohibitions—if drafted within constitutional parameters—might be a valid exercise of legislative discretion.

II. Aggressive Panhandling and the First Amendment

Aggressive panhandling statutes are explicitly designed to address the threats and intimidation that may accompany panhandling. The legislative objective of such prohibitions is not to silence the panhandler or stifle the possible message, but rather to protect others from abusive behavior or unreasonably annoying *conduct*. However, the fact that prohibitions against aggressive panhandling are directed at the panhandler's conduct rather than the purported message does not eliminate the need to examine the legislation in question. .

In order to pass constitutional muster, regulations on threatening or intimidating conduct associated with panhandling must meet the judicial standards set forth in *United States v. O'Brien*,⁷⁷ or must be properly classifiable as reasonable time, place, or manner restrictions.⁷⁸

75. See *supra* notes 18-19 and accompanying text.

76. *Central Hudson*, 447 at 566 n.9 (indicating that the Court would be more receptive to a blanket ban on commercial speech in the event that the expression was deceptive or related to unlawful activity).

77. 391 U.S. 367 (1968).

78. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981).

A. The *O'Brien* Standard

Given that aggressive panhandling statutes attempt to regulate the "nonspeech" elements of a panhandler's conduct,⁷⁹ the standard set forth in *United States v. O'Brien*⁸⁰ will be controlling in any constitutional challenge to this type of regulation. The *O'Brien* standard is appropriate when a regulation restricts nonspeech elements of conduct but also imposes some limitations on First Amendment freedoms:

When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁸¹

In a recent application of the *O'Brien* standard, in *Texas v. Johnson*,⁸² the Court emphasized the third aspect of the standard as the primary difference between the *O'Brien* analysis and the criteria applied when evaluating reasonable time, place, and manner restrictions on free speech:

Although we have recognized that where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," we have limited the applicability of *O'Brien's* relatively lenient standard to those cases in which "the government interest is unrelated to the suppression of free expression."⁸³

79. Note that many anti-aggressive panhandling prohibitions include "obscene or abusive" language among the forbidden "conduct." See *supra* note 8. Although such restrictions clearly relate to a "speech" element of the panhandler's conduct, the Supreme Court has long exempted such words from the category of "speech" the First Amendment strives to protect. *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (affirming the principle that words tending to inflict injury by their very utterance, "fighting words," and words constituting a breach of the peace were not protected under the First Amendment); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (the punishment of "fighting words" by statute is within the constitutional police power of the state); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (observing that legislation prohibiting obscenity was not inconsistent with the First Amendment).

80. 391 U.S. 367 (1968).

81. *O'Brien*, 391 U.S. at 376-77.

82. 491 U.S. 397 (1989).

83. *Id.* at 407 (quoting *O'Brien*, 391 U.S. at 376).

Based on a straightforward interpretation of the *Johnson* decision, the *O'Brien* standard is applied when the governmental interest is not concerned with silencing the individual; otherwise, a reasonable time, place, and manner restriction analysis should be applied.

In order to illustrate an application of this doctrine, a typical aggressive panhandling prohibition will be evaluated under the *O'Brien* standard.

1. *California Penal Code § 647(c)*

Every person . . . (c) [w]ho accosts other persons in any public place . . . for the purpose of begging or soliciting alms is guilty of disorderly conduct, a misdemeanor.⁸⁴

The first prong of the *O'Brien* standard requires that the regulation be within the constitutional power of the governmental entity. Here, the authority of the California State Legislature to enact a criminal regulation against intimidating, threatening, or abusive conduct flows naturally from the state's police power.⁸⁵

To meet the second prong of the *O'Brien* standard, the regulation must further an important or substantial governmental interest. As discussed previously, protecting the public from undue annoyance has been characterized as a substantial government interest.⁸⁶ California's decision to prohibit panhandlers from intimidating or threatening the public would appear to reasonably further a substantial governmental interest.

The third prong requires that the regulation be unrelated to the suppression of free expression. Protecting the public from undue annoyance is unrelated to the suppression of expression. A panhandler in California remains free to communicate any message so desired without repercussions from law enforcement officials. California's state interest lies in keeping its citizens free from intimidating and threatening behavior—it is not the panhandler's "message" that is being regulated but his or her conduct. A panhandler is not prohibited from soliciting alms, so long as the request is made without the accompanying aggressive behavior.

The final prong of the *O'Brien* standard requires the incidental restriction on alleged First Amendment freedoms be no greater than is essential to the furtherance of that interest. Prohibitions against intimidating, threatening, or abusive conduct that accompanies a pan-

84. CAL. PENAL CODE § 647 (West 1995).

85. *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) (A legislature may constitutionally prohibit persons from engaging in a myriad of antisocial conduct, so long as the statutory language specifically indicates which behavior is forbidden.).

86. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980).

handler's solicitation of alms arguably go no further than necessary to promote California's interest in protecting its citizens from undue annoyance. Such restrictions cover only the conduct that would fall short of being classified as harassment or assault, and permits the panhandler to engage in any kind of constitutionally-protected speech. While anti-social conduct is often proscribed within other statutory prohibitions, the conduct of a panhandler does not need to be characterized as harassment or assault before an environment of undue annoyance is created. As such, California is justified in enacting a restriction on aggressive panhandling that still permits the maximum exercise of First Amendment liberties. Given this analysis, prohibitions on aggressive panhandling satisfy the *O'Brien* standard and are therefore constitutional.

Closely related to the *O'Brien* standard is the criteria used for evaluating whether a regulation warrants characterization as a reasonable time, place, and manner restriction on speech.

B. Reasonable Time, Place, and Manner Restrictions

Some restrictions on free speech will be upheld as reasonable time, place, and manner restrictions when the judicial criteria are satisfied.⁸⁷ In order to survive a First Amendment challenge, a regulation prohibiting aggressive conduct which may accompany panhandling must: (1) be content-neutral—in other words, the regulation cannot distinguish between prohibited and permitted conduct based upon the content of the speech,⁸⁸ (2) be narrowly tailored to serve a significant governmental interest,⁸⁹ and (3) leave alternate channels of communication open.⁹⁰ For purposes of analysis, a typical aggressive panhandling prohibition will be evaluated against this criteria.

1. Seattle Municipal Code § 12A.12.015

A person is guilty of pedestrian interference if . . . [that person] intentionally: . . . aggressively begs.⁹¹

87. "Time, place, and manner restrictions are not subject to strict scrutiny and are sustainable if they are content neutral, designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 244 (1990) (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part).

88. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

89. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 691 (1992) (Kennedy, J., concurring) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

90. *Id.*

91. SEATTLE, WASH., MUN. CODE § 12A.12.015 (1987).

First, it must be determined whether or not the statute is content-neutral. The statutory definition of the phrase "aggressively begs" is to "beg with intent to intimidate another person into giving money or goods."⁹² It is immediately apparent that prohibiting "the intent to intimidate another person into giving money or goods" during the course of soliciting funds is content neutral. In fact, this typical aggressive panhandling prohibition seeks to restrict only the *conduct* of the panhandler and makes no effort to regulate or stifle the panhandler's actual speech. Under this ordinance, a panhandler is free to involve the listener in a discussion of politics, economics, societal ills, or passively solicit funds without ever engaging in the forbidden conduct. There is no speech which in and of itself will trigger liability under the statute. In contrast, *conduct* intended to "intimidate another person into giving money or goods" during the course of soliciting funds will subject the violator to criminal liability regardless of the accompanying speech. As such, the prohibition is content-neutral.

Secondly, the statute must be narrowly tailored to serve a significant governmental interest. Protecting the public from undue annoyance has been explicitly recognized as an important governmental interest.⁹³ Prohibiting only undesirable conduct associated with the solicitation of alms furthers Seattle's important interest in protecting the city's citizens from undue annoyance without infringing upon any recognized fundamental liberties.⁹⁴ A statute could not be more narrowly tailored than one that forbids only specified aggressive conduct while permitting the speaker to engage in virtually unlimited discourse, regardless of content. Hence, this ban on aggressive panhandling meets the requirement that it be narrowly tailored to serve a recognized governmental interest.

Finally, the statute must leave alternative channels of communication open. Under the Seattle statute, the panhandler's actual speech is not regulated. Ample alternate channels of communication are open—the panhandler can engage in any kind of speech as long as no intent to intimidate accompanies the communication. If a Seattle panhandler does not engage in any of the legislatively proscribed conduct, the content of the panhandler's message alone can never be the basis for violating the aggressive panhandling statute.

Aggressive panhandling prohibitions withstand constitutional challenges under the First Amendment. However, restrictions on intimidating or threatening behavior which may accompany the panhan-

92. *Id.*

93. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980).

94. Note that there is no recognized fundamental right to harass, intimidate, threaten, or abuse another person in a public forum. *See Gregory v. City of Chicago*, 394 U.S. 111 (1969).

der's solicitation of alms must also survive due process and equal protection challenges in order to be constitutionally valid.

III. Aggressive Panhandling and Due Process

No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law.⁹⁵

The conclusion that blanket bans on panhandling are unconstitutional under the First Amendment removes such prohibitions from our analysis. However, prohibitions limited to aggressive panhandling seem to pass constitutional muster under the First Amendment. This is merely the first of three hurdles which aggressive panhandling restrictions must clear in order to satisfy judicial scrutiny. The second obstacle requires aggressive panhandling statutes to be consistent with the Due Process Clause of the Fourteenth Amendment. To survive a due process challenge, such legislation must not be unreasonably vague.⁹⁶

A. The Void for Vagueness Doctrine

The Void for Vagueness Doctrine involves two distinct criteria with which aggressive panhandling statutes must comport. First, the prohibition must be drafted in such a way that a panhandler of ordinary intelligence would be able to understand what type of conduct is prohibited. Such an understanding amounts to sufficient notice.⁹⁷ Secondly, the statutory language must not be worded in such a manner that permits arbitrary or discriminatory application by law enforcement officials.⁹⁸ In *Grayned v. City of Rockford*, the Court succinctly stated this well-settled doctrine:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. . . . [W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.⁹⁹

95. U.S. CONST. amend. XIV, § 1.

96. *Kolender v. Lawson*, 461 U.S. 352, 353-54 (1983).

97. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

98. *Id.* at 109.

99. *Id.* at 108-09.

The Supreme Court has not explicitly described how statutory language must be worded in order to avoid being characterized as vague. However, two general guidelines exist. First, if statutory language is susceptible to more than one possible interpretation from the perspective of a person of ordinary intelligence, the prohibition would be vague and indefinite as to what conduct is proscribed and the proscription is unconstitutionally vague.¹⁰⁰

Secondly, the Court has indicated the most important safeguard of the Void for Vagueness Doctrine "is not actual notice, but . . . [rather] the requirement that a legislature establish minimal guidelines to govern law enforcement."¹⁰¹ A statute clearly proscribing specific and particular conduct removes any undue subjectivity on the part of law enforcement officials in determining whether or not to charge a person with a violation.

Of great significance to the drafters of aggressive panhandling statutes, the Court has made clear that a facial challenge to a criminal statute may be successful despite the possibility that a *conceivable* application may be valid.¹⁰² An analogous illustration of the Court's application of the Void for Vagueness Doctrine is found in *Coates v. City of Cincinnati*.¹⁰³ *Coates* involved a facial challenge to a state criminal statute. The Ohio State statute made it unlawful for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by."¹⁰⁴ In finding the statute facially unconstitutional, the Court observed:

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."¹⁰⁵

In determining the vagueness or clarity of statutory language, the reviewing court generally relies upon the stated statutory definition,¹⁰⁶

100. *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964) (holding that a Washington State statute requiring teachers to take an oath swearing allegiance to the government of the United States and exhibiting reverence for law and order was unconstitutionally vague).

101. *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

102. *See Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983) (White, J., dissenting) ("[legislation] should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications").

103. 402 U.S. 611 (1971).

104. *Id.* at 611 n.1 (quoting CINCINNATI, OHIO, CODE § 901-L6 (1956)).

105. *Id.* at 614 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

106. *See, e.g., City of Seattle v. Webster*, 115 Wash. 2d 635, 640 (Wash. 1990) (utilizing the included statutory definitions of "aggressively beg" and "obstructing pedestrian or vehicular traffic" for purposes of evaluating the vagueness of the language prohibiting the conduct).

or upon the stated legislative intent accompanying the drafting of the statute.¹⁰⁷ Failure of the statute to define its terms will usually force a court to review a commonly accepted dictionary as the prevailing authority.¹⁰⁸ With this background in place, two typical aggressive panhandling statutes will be analyzed for consistency with the Due Process Clause of the Fourteenth Amendment.

1. *California Penal Code § 647(c)*

California Penal Code § 647(c)¹⁰⁹ contains the following provision:

Every person . . . (c) [w]ho accosts other persons in any public place . . . for the purpose of begging or soliciting alms is guilty of disorderly conduct, a misdemeanor.¹¹⁰

In applying the Void for Vagueness Doctrine, it is first necessary to determine whether any statutory terms are susceptible to more than one interpretation by a person of ordinary intelligence.¹¹¹ As the United States Supreme Court observed in *Baggett v. Bullitt*,¹¹² if statutory language is susceptible to more than one possible meaning, the prohibition is vague and indefinite as to what specific conduct is prohibited and is unconstitutional.¹¹³ The constitutionality of California Penal Code § 647(c) depends upon the interpretation of the term "accost." Initially, a California superior court concluded that "if 'accost' were to have two possible meanings, the statute would be vague and

107. See *Ulmer v. Municipal Ct.*, 127 Cal. Rptr. 445 (Alameda County 1976); with respect to CAL. PENAL CODE § 647(c), The *Ulmer* Court noted that:

This section is drafted to meet the problem of controlling panhandling by describing specific acts. It is aimed at the conduct of the individual who goes about the streets accosting others for handouts. It is framed in this manner in order to exclude from one ambit of the law the blind or crippled person who merely sits or stands by the wayside, the Salvation Army worker who solicits funds for charity on the streets at Christmas time and others whose charitable appeals may well be left to local control.

127 Cal. Rptr. at 447 (citing transcripts of relevant legislative discussions relating to the purpose of the statute).

108. *Grayned*, 408 U.S. at 111 n.16 (using Webster's Third New International Dictionary to define the statutory term, "diversion"); *State v. Starr & Combs*, 113 P.2d 356, 358 (Ariz. 1941) (using Webster's Dictionary to define the statutory term, "loiter").

109. Note that this statute has been constitutionally evaluated with differing results by a Court of Appeal of California in *Ulmer*, 127 Cal. Rptr. 445 (1976) (holding that "begging" is not protected speech under the First Amendment and that the word "accost" is not unconstitutionally vague), and a federal district court in *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991) (holding that "begging" constitutes protected speech and the statute only bans "accost[ing]" for the purpose of soliciting alms, while other "accost[ing]" is lawful) (vacated on procedural grounds).

110. CAL. PENAL CODE § 647 (West 1995).

111. See *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

112. 377 U.S. 360 (1964).

113. *Id.* at 367.

indefinite as to what conduct it prohibits and therefore unconstitutional.”¹¹⁴ The superior court observed that available dictionary references yielded multiple definitions for the term “accost,” one of which rendered the prohibition in question unconstitutional for criminalizing protected conduct.¹¹⁵ However, the reviewing appellate court reversed the lower court’s ruling and held that the statute was not unconstitutionally vague.¹¹⁶ The reviewing appellate court elected to base its conclusion on transcripts of the legislative discussions.¹¹⁷

Although there is no judicial requirement that the reviewing court look only to the definitions contained within the statute, or to definitions available within commonly available dictionaries, the reasoning of the *Ulmer* court is in direct contrast with the Void for Vagueness Doctrine. The approach taken by the *Ulmer* Court implies that it is more reasonable for a person of ordinary intelligence to review transcripts of the enacting legislature rather than to research the definition of statutory language within commonly available dictionaries. Such reasoning is tenuous at best, and ludicrous at worst. A person of ordinary intelligence desiring to inform himself or herself as to what conduct is prohibited by California Penal Code § 647(c) is likely to encounter differing interpretations of the crucial term, “accost.” Rather than turning to legislative transcripts, a person of ordinary intelligence is likely to pursue the strategy often used by the United States Supreme Court,¹¹⁸ namely opening a dictionary to look up the word.

A survey of two commonly available dictionaries resulted in the following definitions of “accost”: (1) “to approach and speak to often in a challenging or aggressive way,”¹¹⁹ and (2) “to approach, especially with a greeting, question, or remark.”¹²⁰ Armed with these two plausible and well-supported interpretations, a panhandler of ordinary intelligence *may* realize that the term “accost” refers to an approach in a challenging or aggressive manner, and may refrain from such behavior

114. As discussed by the reviewing court in *Ulmer*, 127 Cal. Rptr. at 445 (citing *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964)).

115. *Ulmer*, 127 Cal. Rptr. at 448. One common interpretation of “accost” defines it as “to approach, especially with a greeting, question, or remark.” RANDOM HOUSE WEBSTER’S CONCISE DICTIONARY 5 (1st ed. 1993). Note that approaching a person with a greeting or question is constitutionally protected conduct under the First Amendment free speech guarantee, see *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972), and may not be prohibited merely because the purpose of the approach is to solicit alms. Such an interpretation would lead to a result that is constitutionally indistinguishable from a “blanket ban” on panhandling.

116. *Ulmer*, 127 Cal. Rptr. at 448.

117. *Id.*

118. See *Grayned*, 408 U.S. at 111 n.16.

119. WEBSTER’S NEW COLLEGIATE DICTIONARY 8 (5th ed. 1981).

120. RANDOM HOUSE WEBSTER’S CONCISE DICTIONARY, *supra* note 115.

as the prohibition intended. Were this the only plausible definition of "accost," the prohibition would be constitutional on its face since persons of ordinary intelligence would not necessarily have to guess as to which conduct is prohibited.¹²¹ However, a panhandler who has the misfortune of relying upon the second of these two definitions will be forced to avoid engaging in constitutionally protected conduct. This is disturbing in the sense that following one of the possible definitions for the term "accost" results in the chilling of conduct which is protected by the First Amendment—namely, approaching another with a greeting, question, or remark with the purpose of soliciting alms. Such prohibitions are viewed with particular disapproval by reviewing courts.¹²²

Based upon an application of the Void for Vagueness Doctrine, California Penal Code § 647(c) is unconstitutional on its face and one is forced to conclude that the reasoning of the California appellate court in *Ulmer* is extremely suspect and would not withstand further judicial review by the United States Supreme Court. Since the term "accost" is subject to more than one reasonable interpretation, it facilitates arbitrary and discriminatory application by law enforcement officials. Such statutory language is unlikely to survive further judicial review.

This is not to suggest that all aggressive panhandling prohibitions are unconstitutional per se, but rather to illustrate just how crucial the drafting of legislation is with respect to the Due Process Clause. While it is highly doubtful the California statute (or any other similarly-constructed statute) would survive judicial scrutiny at the United States Supreme Court level, the Seattle ordinance would likely receive judicial approval since its aggressive panhandling prohibition is facially valid.

2. *Seattle Municipal Code § 12A.12.015*

A person is guilty of pedestrian interference [a misdemeanor] if . . . [that person] intentionally: . . . aggressively begs.¹²³

To meet the first criteria of the Void for Vagueness Doctrine, the Seattle ordinance must provide sufficient notice to people of ordinary intelligence. The ordinance contains the following crucial language: "The following definitions apply in this section: . . . 'aggressively begs' means to beg with intent to intimidate another person into giving

121. Note also that there are no First Amendment concerns, since this statute specifically prohibits behavior (rather than "speech" or "expressive conduct")—a regulation that has been recognized as within the constitutional authority of the government.

122. *Grayned*, 408 U.S. at 109; *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961).

123. SEATTLE, WASH., MUN. CODE § 12A.12.015 (1987).

money or goods.”¹²⁴ The city council purported to define the relevant statutory language and the definition of the term “intimidate” is clearly crucial for purposes of the Void for Vagueness Doctrine. Were a person of ordinary intelligence to seek guidance as to the term “intimidate,” available dictionary interpretations provide the following definitions: (1) “to make timid or fearful; especially to compel or deter by or as if by threats,”¹²⁵ and (2) “to make timid; [to] fill with fear, . . . to force into or deter from some action by inducing fear.”¹²⁶

Given these consistent definitions, it is highly unlikely that a person of ordinary intelligence would have to guess what conduct is prohibited by the statute. Even if a panhandler of ordinary intelligence were unable to determine the meaning of “intimidate” based on common everyday experiences of life, the dictionary definition is not susceptible to multiple interpretations. Intimidate has only *one* meaning: to intentionally make fearful. Thus, it is doubtful that such an argument would persuade a reviewing court that the statute is void for vagueness.

The next criteria to be met under the Void for Vagueness Doctrine is whether there are adequate guidelines to govern enforcement of the statute. Although law enforcement officials cannot avoid making some subjective determinations with regard to violations of statutorily proscribed behavior,¹²⁷ a statute which clearly sets forth the forbidden conduct in commonly understood terms inherently safeguards against arbitrary or discriminatory enforcement.¹²⁸

Based upon existing Void for Vagueness jurisprudence, the second prong of the doctrine is satisfied if the statute’s violation is based upon relatively objective standards. Given the commonly accepted definition of “intimidate” used in Seattle’s ordinance, a law enforcement officer has explicit standards upon which to apply the aggressive panhandling prohibition to specific circumstances. Not only must an offender be panhandling, the panhandler must also be acting in a manner designed to *purposely* fill the solicitee with fear, and to compel or force the desired contribution.

This requires little if any subjective interpretations of conduct. The panhandler violates this statute only if he or she “intimidates” a potential solicitee while attempting to obtain money or goods. The minimal subjectivity necessary in making this determination is well within the permissible range of judgment entrusted to law enforce-

124. *Id.* (emphasis added).

125. WEBSTER’S NEW COLLEGIATE DICTIONARY, *supra* note 119, at 605.

126. RANDOM HOUSE WEBSTER’S CONCISE DICTIONARY, *supra* note 115, at 349.

127. “As always, enforcement requires the exercise of some degree of police judgment.” *Grayned*, 408 U.S. at 114. Where the ordinance “delineates its reach in words of common understanding,” some degree of police judgment is permissible. *Id.* at 112.

128. *Id.*

ment officials. Both the requisite unlawful intent and the accompanying proscribed conduct must occur before the ordinance is violated. Seattle's clear legislative standard is distinguishable from the more questionable and subjective standards created by such terms as "annoying"¹²⁹ or "accosting."¹³⁰

Seattle Municipal Code § 12A.12.015 therefore passes judicial scrutiny under the Void for Vagueness Doctrine.¹³¹ As such, this properly-worded aggressive panhandling prohibition survives a facial constitutional challenge and is consistent with the Due Process Clause of the Fourteenth Amendment.

Based upon the foregoing analysis, it is well within the ability and authority of a government to prohibit aggressive panhandling. The only drafting requirements are that: (1) the proscribed conduct be clearly and explicitly stated so as to provide sufficient notice, and (2) the prohibition not be susceptible to arbitrary or discriminatory enforcement.

Although blanket bans on panhandling cannot survive a constitutional challenge under the First Amendment, prohibitions on aggressive panhandling are within the ambit of legislative prerogatives under the free speech guarantees of the First Amendment and the Due Process Clause. With this in mind, the only remaining constitutional challenge to the validity of aggressive panhandling prohibitions lies within the Equal Protection Clause of the Fourteenth Amendment.

IV. Aggressive Panhandling and Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹³² As Justice Stone stated within his seminal *United States v. Carolene Products Co.*¹³³ footnote, there are two categories of civil liberties cases in which the Court will review the challenged legislation with strict scrutiny:¹³⁴ (1) when legislation

129. The vagueness of the statutory term "annoying" was the basis upon which the Court in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), struck down a Cincinnati, Ohio loitering prohibition.

130. The statutory language contained within the California aggressive panhandling statute; see *supra* notes 109-122 and accompanying text for discussion of California Penal Code § 647(c).

131. A similar conclusion was reached by the court in *City of Seattle v. Webster*, 115 Wash. 2d 635 (Wash. 1990) (deciding that S.M.C. § 12A.12.015 survived judicial scrutiny under the Void for Vagueness Doctrine).

132. U.S. CONST. amend. XIV, § 1.

133. 304 U.S. 144, 152 n.4 (1938).

134. Note that "strict scrutiny" requires that legislation be "narrowly drawn" to further a "compelling state interest." See, e.g., *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 677 (1992).

differentiates between persons in their ability to exercise *any right* based upon some *suspect classification*, and (2) when legislation differentiates between *individuals* as to their ability to exercise any fundamental right.¹³⁵ The rationale for this exacting judicial scrutiny in the former instance is the inability of discrete and insular minorities to effectuate change within the political system.¹³⁶ In other words, certain minorities lack the political clout necessary to ensure that their individual liberties are not infringed upon by the ruling majority.¹³⁷ As such, the Court is fulfilling its primary function of guarding against governmental infringement upon fundamental individual liberties.

A. Indigents Are Not a Suspect Class

Although arguments to the contrary are frequently made, indigent members of American society have never been recognized as a suspect class¹³⁸ for purposes of equal protection analysis.¹³⁹ A persuasive argument can be made that indigence should be accorded protected status on the basis of the suspect trait of poverty, which essentially relegates class members to the status as a discrete and insular minority. However, the Supreme Court has repeatedly refused to acknowledge the nation's poor as a class deserving the same judicial

135. *Carolene Products*, 304 U.S. at 152 n.4.

136. *Id.*

137. *Id.*

138. The Supreme Court has determined that the following "discrete and insular" groups be accorded status as "classes" within the meaning of the Equal Protection Clause: (1) race and national origin (*see, e.g., Korematsu v. United States*, 323 U.S. 214, 216 (1944) (setting forth the standard of judicial review for individuals classified based upon race and announcing that racial classifications, "suspect" per se, must be examined with the most "rigid scrutiny")); (2) alienage (*see, e.g., Graham v. Richardson*, 403 U.S. 365 (1971) (classifications based upon alienage are "suspect")); (3) illegitimacy (*see, e.g., Levy v. Louisiana*, 391 U.S. 68 (1968) (legislation classifying children based upon the marital status of the parents is subject to intermediate review—it must be "substantially related to an important government interest")); and (4) gender (*see, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976) (legislation which classifies persons on the basis of gender must be examined with intermediate scrutiny)).

All other legislation which "classifies" persons differently in terms of treatment under the law in the broad area of economics or social welfare is reviewed under the "rational basis test," which is extremely deferential to the legislature. Under this level of judicial review, the legislation will be upheld if the law rationally relates to a legitimate governmental purpose. *See, e.g., United States v. Kras*, 409 U.S. 434 (1973) (holding that access to the bankruptcy courts could be denied to those persons unable to afford the \$50 filing fee where a rational justification exists).

139. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (declaring that classifications drawn along economic lines "are traditionally disfavored"; however, stopping short of according "suspect" status to indigents). *See also City of Seattle v. Webster*, 115 Wash. 2d 635, 647 (Wash. 1990) (taking judicial notice of the fact that no judicial precedent exists for characterizing indigence as a suspect class).

protection as recognized suspect classes.¹⁴⁰ Historically, the Court has treated wealth classifications¹⁴¹ in the same manner as any other non-suspect classification not implicating the exercise of fundamental rights.¹⁴² In these cases, the legislation in question is merely subjected to a rational basis review. In the absence of a judicial determination that indigence is a suspect class, any successful equal protection challenge to aggressive panhandling statutes must establish that the regulation differentiates between persons in their ability to exercise a fundamental constitutional right.

B. Discriminatory Treatment in the Exercise of a Fundamental Right

The United States Supreme Court has repeatedly held that the exercise of a fundamental right may not be based upon an individual's wealth.¹⁴³ In the words of the Court, "[f]reedom of speech . . . , which [is] protected by the First Amendment from infringement by Congress, [is] among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action."¹⁴⁴ Given this precedent, if an aggressive panhandling statute implicates a fundamental constitutional right, the Court will examine that legislation under the strict scrutiny level of review.¹⁴⁵ This is significant given the fact that legislation challenged under the Equal Protection Clause and subjected to strict scrutiny is rarely upheld.¹⁴⁶

1. *Panhandling as Protected Commercial Speech*

As the initial constitutional inquiry in this Note demonstrated, prohibitions on aggressive panhandling unquestionably implicate First

140. See *Harper*, 383 U.S. at 668.

141. Generally defined to include any legislation which burdens the poor as a class to a greater extent than other individuals, see, e.g., JOHN E. NOWACK & DONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.25 (4th ed. 1991).

142. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221 (1981) (receiving social security income is not a fundamental right); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (entitlement to Aid for Families with Dependent Children is not a fundamental right). See also *United States v. Kras*, 409 U.S. 434 (1973); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (applying the rational basis level of review to legislation where classifications of poor people were burdened in their access to the judicial process, but where no fundamental right is involved).

143. *Douglas v. California*, 372 U.S. 353, 355 (1963) (holding that where a criminal defendant is not appointed counsel in the first appeal as of right, there has been an impermissible discrimination between the wealthy and the indigent); *Harper*, 383 U.S. at 666 (conditioning the right to vote upon the payment of any fee or tax violates the Equal Protection Clause); *Boddie v. Connecticut*, 401 U.S. 371, 381 (1971) (conditioning access to marital dissolution procedures on the ability to pay judicial fees is unconstitutional discrimination against the indigent).

144. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

145. See *supra* text accompanying notes 134-135.

146. *Burson v. Freeman*, 504 U.S. 191, 208 (1992) ("[i]t is the rare case in which we have held that a law survives strict scrutiny").

Amendment guarantees to free speech.¹⁴⁷ Although no successful equal protection challenge to aggressive panhandling legislation has been made under the First Amendment, legislation need only implicate an individual's ability to exercise a First Amendment right in order to qualify for strict scrutiny review by the Court.

2. *The Content Neutrality Requirement*

Although the judicial standard for determining whether or not legislation is constitutional was initially identical under both the Due Process and Equal Protection Clauses,¹⁴⁸ the Court has often deviated from the strict scrutiny approach in equal protection cases.¹⁴⁹ The leading equal protection case involving the First Amendment but not a suspect class is *Carey v. Brown*.¹⁵⁰ In *Carey*, the Court stated, "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be *finely* tailored to serve *substantial* state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."¹⁵¹ As will be shown, *Carey* is the controlling case for an equal protection challenge to an aggressive panhandling prohibition.

Eight years prior to the decision in *Carey*, the Court decided *Police Department of Chicago v. Mosley*,¹⁵² a similar equal protection "picketing" case. In both cases, the challenged legislation made a distinction between legal and illegal picketing based on the subject matter of the picketing activity. The Illinois statute in *Carey* generally prohibited all picketing of a residence unless the dispute was labor-related.¹⁵³ The Court held the legislation to be unconstitutional under the Equal Protection Clause, stating that "the Illinois statute discriminates between lawful and unlawful conduct based upon the content of the . . . communication."¹⁵⁴

The Court faced a similar issue in *Mosley*.¹⁵⁵ Similar to the challenged legislation in *Carey*, the Chicago ordinance in *Mosley* prohibited all picketing within a certain distance from a school unless the

147. See *supra* Part I, which concludes that at a minimum, panhandling can be classified as "commercial speech."

148. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

149. *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (both cases utilizing an "intermediate" level of judicial review).

150. 447 U.S. 455 (1980).

151. *Id.* at 461-62 (citing *Mosley*, 408 U.S. at 98-99, 101) (emphasis added).

152. 408 U.S. 92 (1972).

153. *Carey*, 447 U.S. at 457.

154. *Id.* at 460.

155. 408 U.S. 92 (1972).

dispute was labor-related.¹⁵⁶ In striking down the ordinance under the Equal Protection Clause, the Court stated, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹⁵⁷ Applying the First Amendment specifically to the Chicago ordinance, the Court held that "discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, [the ordinance] may not stand."¹⁵⁸

It is well-settled that legislation limiting an individual's right to free speech must be content-neutral.¹⁵⁹ In its discussion of an equal protection challenge involving the First Amendment, the *Carey* Court declared that a content-based restriction on fundamental First Amendment liberties may be a valid exercise of government police power in limited circumstances: "[T]hough we might agree that certain state interests may be *so compelling* that where no adequate alternatives exist a content-based distinction—if *narrowly drawn*—would be a permissible way of furthering those objectives . . . , this is not such a case."¹⁶⁰ While the initial approach taken by the *Carey* Court in analyzing this equal protection issue appears to suggest an intermediate level of review,¹⁶¹ the *Carey* majority clearly requires that legislation infringing upon the exercise of fundamental First Amendment rights must survive strict scrutiny in order to pass constitutional muster under the Equal Protection Clause.¹⁶²

Despite this conflict within the Court's analysis, an equal protection analysis of the panhandling provision must nonetheless answer the following two questions: (1) whether aggressive panhandling prohibitions distinguish between lawful and unlawful speech-related conduct based upon the *content of the communication*, and (2) if such legislation makes a content-based distinction, is the prohibition nonetheless narrowly drawn so as to further a sufficiently compelling state interest? It will be instructive to apply the foregoing principles to representative aggressive panhandling prohibitions. California Penal Code section 647(c) and Seattle Municipal Code section 12A.12.015, selected earlier for purposes of applying the Void for Vagueness Doctrine under the Due Process Clause, will also best serve our equal protection analysis.

156. *Id.* at 92.

157. *Id.* at 95; *see also* *Street v. N.Y.*, 394 U.S. 576, 591 (1976); *Cohen v. California*, 403 U.S. 15, 24 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

158. *Mosley*, 408 U.S. at 102.

159. *Id.* at 95; *Cohen v. California*, 403 U.S. 15, 24 (1971).

160. *Carey*, 447 U.S. at 465 (emphasis added); *see also* *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

161. *Id.* at 461-62 (citing *Mosley*, 408 U.S. at 98-99, 101).

162. *Id.*

a. California Penal Code § 647(c)

Every person . . . (c) [w]ho accosts other persons in any public place . . . for the purpose of begging or soliciting alms is guilty of disorderly conduct, a misdemeanor.¹⁶³

As discussed previously, "accosts" is an ambiguous term which could reasonably be interpreted as meaning either: (1) "to approach and speak to, often in a challenging or aggressive way,"¹⁶⁴ or (2) "to approach, especially with a greeting, question, or remark."¹⁶⁵ Earlier analysis demonstrated that this ambiguity was a fatal defect for purposes of the Void for Vagueness Doctrine under the Due Process Clause of the Fourteenth Amendment.¹⁶⁶ However, for purposes of equal protection analysis, the flaw lies not within the statutory meaning of the term "accosts," but rather within the differentiation between lawful and unlawful conduct based upon the *content* of the communication.

The application of the California statute could result in two outcomes. Regardless of which definition is controlling, an indigent person who "accosts" another person for the purpose of asking for directions or the time of day would be engaging in *lawful* behavior. In direct contrast to that scenario, a student who finds herself twenty-five cents short for public transportation and "accosts" a passerby for a quarter would be guilty of violating the statute. In the former scenario, the act of accosting is lawful since the purpose was not to solicit alms. In the latter scenario, an identical act of accosting would be illegal based *solely on the content* of the person's speech—a fundamentally protected constitutional right.

These illustrations show that California Penal Code section 647(c) improperly differentiates between lawful and unlawful activities based upon the content of the communication.¹⁶⁷ In the words of the Court in *Police Department of Chicago v. Mosley*¹⁶⁸ regarding the unconstitutionality of a picketing ordinance, "the discrimination . . . is based on the content of [the] expression. Therefore, under the Equal Protection Clause, it may not stand."¹⁶⁹

Although California Penal Code section 647(c) facially violates the Equal Protection Clause, the Court in *Carey v. Brown*¹⁷⁰ recog-

163. CAL. PENAL CODE § 647(c) (West 1995).

164. WEBSTER'S NEW COLLEGIATE DICTIONARY, *supra* note 119.

165. RANDOM HOUSE WEBSTER'S CONCISE DICTIONARY, *supra* note 115.

166. See *supra* notes 119-122 and accompanying text.

167. See also *Blair v. Shanahan*, 775 F. Supp. 1315, 1325 (N.D. Cal. 1991) (reaching a similar conclusion under an Equal Protection Clause analysis given different facts). See *supra* note 7.

168. 408 U.S. 92 (1972).

169. *Id.* at 102.

170. 447 U.S. 455 (1980).

nized that certain state interests may be *so compelling* that a narrowly drawn, content-based distinction may be valid where no other adequate alternatives exist to further those interests.¹⁷¹ For example, the Court has found that states have a substantial interest in protecting their citizens from undue annoyance,¹⁷² but that this governmental objective falls short of being a compelling interest required under strict scrutiny. Additionally, the allegedly *compelling* state interests such as protecting persons from threatening, intimidating, or abusive behavior are more than adequately provided for by alternative prohibitions which do not burden individuals in their ability to exercise the fundamental constitutional right of free speech. In the words of one district court, "a plethora of content neutral statutes with which the population at large may be protected from threatening conduct" are currently available to law enforcement agencies.¹⁷³

As the analysis of this Note has demonstrated, California Penal Code section 647(c)—which criminalizes aggressive panhandling—is a content-based statute distinguishing between lawful and unlawful behavior. While this determination raises a strong presumption of unconstitutionality, the statute would nevertheless survive review if a sufficiently compelling state interest were furthered by the statute and no other adequate alternatives for accomplishing that governmental objective are available. However, California Penal Code section 647(c) fails to satisfy strict scrutiny examination for two reasons. First, protecting its citizens from the undue annoyance that often results from an encounter with an aggressive panhandler fails to warrant characterization as a compelling state interest.¹⁷⁴ Second, even if such a state interest was found compelling enough to justify an infringement upon a person's exercise of a fundamental First Amendment right,¹⁷⁵ the prohibition falls short of the requirement that no other adequate alternatives be available.¹⁷⁶

The foregoing analysis is not meant to suggest that all aggressive panhandling prohibitions violate the Equal Protection Clause. On the contrary, the previous discussion only serves to illustrate the difficult constitutional pitfalls facing the drafters of such legislation. As the following analysis of the Seattle ordinance will demonstrate, a prop-

171. *Id.* at 465; see also *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

172. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (noting that "undue annoyance" is a *substantial* governmental interest rather than a *compelling* governmental interest).

173. *Blair*, 775 F. Supp. at 1324. A partial listing includes the following statutes: CAL. PENAL CODE §§ 211 (robbery), 240 (assault), 242 (battery), 415(1) (challenging to a fight), 415(2) (disturbing another by a loud noise), 415(3) (use of offensive words), and 647(f) (willful and malicious obstruction of thoroughfares and public places) (West 1995).

174. *Village of Schaumburg*, 444 U.S. at 636.

175. *Carey v. Brown*, 447 U.S. 455, 465 (1980).

176. *Id.*

erly-drafted, content-neutral aggressive panhandling prohibition can exist in constitutional harmony with the Equal Protection Clause.

b. Seattle Municipal Code § 12A.12.015

A person is guilty of pedestrian interference [a misdemeanor] if . . . [that person] aggressively begs.¹⁷⁷

The term "aggressively begs" is defined by the statute as panhandling "with intent to intimidate another person into giving money or goods."¹⁷⁸ Such language is not readily subject to differing interpretations.

The distinction between the Seattle ordinance and the California statute is apparent. Whereas California attempted to prohibit only certain acts of accosting having the purpose of soliciting alms, the drafters of Seattle's prohibition designed the ordinance to criminalize only panhandling intended to *intimidate* the solicitee into parting with money or goods. The distinction between these respective prohibitions is subtle but constitutionally significant under an equal protection analysis. As demonstrated previously, the California statute distinguishes between lawful and unlawful accosting based upon the content of the accompanying communication, which violates the Equal Protection Clause. In contrast, the Seattle ordinance distinguishes between lawful and unlawful panhandling not on the content of the panhandler's communication, but rather on the related *conduct* accompanying the solicitation of alms.

The Seattle ordinance is content-neutral and does not burden an individual's ability to exercise any fundamental First Amendment rights. Neither intimidating conduct nor threatening speech is a recognized form of communication protected under the free speech guarantees of the First Amendment.¹⁷⁹ In Seattle, all panhandlers who beg with the intent to intimidate others into surrendering money or goods are treated equally without any reference to the content of their speech. Each is guilty of violating the ordinance since the intent was to intimidate another into making a donation.

C. Aggressive Panhandling and Equal Protection: A Conclusion

The constitutionality of aggressive panhandling legislation depends largely on the construction and interpretation of the prohibition when challenged under the Equal Protection Clause. Content-based legislation which differentiates between lawful and unlawful conduct based on the content of the communication violates the Equal Protection Clause. The lone exception to this principle arises when a state

177. SEATTLE, WASH., MUN. CODE § 12A.12.015 (1987).

178. *Id.*

179. See *supra* note 79 and accompanying text.

interest is sufficiently compelling and no other adequate alternative measures will further that interest as well as a content-based restriction.

California Penal Code section 647(c) is an example of constitutionally deficient legislation. Seattle Municipal Code section 12A.12.015, on the other hand, is an example of a content-neutral aggressive panhandling prohibition which does not differentiate between lawful and unlawful conduct based upon the content of the communication. While the difference in statutory language between valid and unconstitutional governmental enactments may be extremely subtle, it is only the carefully-drafted aggressive panhandling legislation that will survive judicial scrutiny under the Equal Protection Clause.

Conclusion

Evidence of the general public's frustration with aggressive panhandlers has never been more prevalent. This frustration has fueled the public's expectations that legislators will take some action to ban this activity.¹⁸⁰

Current proscriptions on aggressive panhandling have replaced former blanket bans on panhandling.¹⁸¹ Although blanket bans on panhandling are likely to be declared constitutionally invalid under the First Amendment, similar prohibitions on aggressive panhandling should survive scrutiny. In contrast to the minimal First Amendment obstacles to aggressive panhandling prohibitions, efforts to draft constitutionally valid legislation under the Due Process and Equal Protection Clauses are fraught with pitfalls which are not easily avoided. The difference between constitutionality and unconstitutionality can depend on the interpretation of a single ambiguous word, or upon whether the law purports to prohibit only conduct and not speech.

Unfortunately for the nation's indigents, legislators can learn the skill of drafting a constitutional law prohibiting "aggressive" panhandling. Given the resources currently devoted to crafting this type of legislation, it would be a welcome surprise if legislators spent an equal amount of time, money, and effort solving the ills which necessitate panhandling in the first place.

180. UNITED STATES CONF. OF MAYORS, A STATUS RPT. ON HUNGER & HOMELESSNESS IN AMERICA'S CITIES: 1990 50-53 (1990); *see also supra* note 1 and accompanying text.

181. *See supra* note 8 and accompanying text.